
No. 09-1272

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Petitioner

v.

HOLLIS DESHAUN KING,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Commonwealth asks this Court to resolve legal issues that are not presented by this case. The Commonwealth's police-created exigency question presupposes that exigent circumstances existed. They did not. The odor of burnt marijuana and the sound of "people moving around" inside a dwelling do not support the factual inference that evidence is in the process of being destroyed. The Commonwealth's hot pursuit question likewise presupposes that the police entered King's apartment in pursuit of a felon. They did not. The whereabouts of a cocaine dealer on the lam played no role in the officers' decision to enter King's apartment. The Commonwealth distorts the record and creates the impression that this case presents a vehicle for resolving weighty constitutional questions. It does not. The questions this case does present are:

1. Should this Court disturb the lower court's factual finding that "the police were not in pursuit of a fleeing suspect" when they entered King's apartment in order to decide a question about the hot pursuit exception that is not applicable to this case and has not divided any of the federal appellate courts?
2. Should this Court ignore the fact that exigent circumstances never existed, either before or after the police knocked on King's apartment door and announced their presence, in order to issue an advisory opinion on the proper test for evaluating created-exigency cases?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
TABLE OF CONTENTS	1
REASONS FOR DENYING THE WRIT	3
I. This Court should not disturb the lower court’s factual finding that “the police were not in hot pursuit of a fleeing felon” in order to decide a question about the hot pursuit exception that has not divided the Courts of Appeal.	3
A. Because the police were not in pursuit of a fleeing felon when they entered King’s apartment, the hot pursuit question presented by the Commonwealth calls for an advisory opinion from this Court.	3
B. The Courts of Appeal apply the same “totality of the circumstances” test to determine whether exigent circumstances exist and the hot pursuit question applies.	5
C. The fact that one state’s intermediate appellate court has issued a single opinion in disagreement with the Kentucky Supreme Court, the Georgia Supreme Court, and the “totality of the circumstances” approach employed by all of the Courts of Appeal does not merit this Court’s attention.	7
II. The Commonwealth’s police-created exigency question calls for an advisory opinion from this Court.	8
III. The Commonwealth exaggerates the division between the Courts of Appeal in order to create the false impression that the courts are “irreconcilably split.”	16
CONCLUSION	22

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES CASES

<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288 (1936).....	3
<i>Brigham City, Utah v. Stuart</i> , 547 U.S. 398 (2006)	5, 6
<i>Florida v. Rodriguez</i> , 469 U.S. 1 (1984)	7
<i>Hernandez v. New York</i> , 500 U.S. 352 (1991)	4
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006).....	11
<i>Johnson v. United States</i> , 333 U.S. 10 (1948).....	passim
<i>Kirk v. Louisiana</i> , 536 U.S. 635 (2002)	15
<i>Maryland v. Dyson</i> , 527 U.S. 465 (1999).....	11
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	17
<i>Ohio v. Robinette</i> , 519 U.S. 33 (1996)	5, 6
<i>Payton v. New York</i> , 445 U.S. 573 (1980)	15
<i>Richards v. Wisconsin</i> , 520 U.S. 385 (1997).....	passim
<i>Taylor v. United States</i> , 286 U.S. 1 (1932)	10
<i>United States v. Karo</i> , 468 U.S. 705 (1984)	11

UNITED STATES COURT OF APPEALS CASES

<i>Creighton v. Anderson</i> , 922 F.2d 443 (8th Cir. 1990).....	6
<i>Dorman v. United States</i> , 435 F.2d 385 (D.C. Cir. 1970)	6
<i>Ewolski v. City of Brunswick</i> , 287 F.3d 492 (6th Cir. 2002)	18
<i>United States v. Adams</i> , 621 F.2d 41 (1st Cir. 1980)	6
<i>United States v. Anderson</i> , 154 F.3d 1225 (10th Cir. 1998)	6

TABLE OF AUTHORITIES
(Continued)

<i>United States v. Carr</i> , 939 F.2d 1442 (10th Cir. 1991).....	14
<i>United States v. Cisneros-Guiterrez</i> , 598 F.3d 997 (8th Cir. 2010).....	17
<i>United States v. Clarke</i> , 564 F.3d 949 (8th Cir. 2009)	11
<i>United States v. Coles</i> , 437 F.3d 361 (3d Cir. 2006).....	16
<i>United States v. Collins</i> , 510 F.3d 697 (7th Cir. 2007).....	14
<i>United States v. Duchi</i> , 906 F.2d 1278 (8th Cir. 1990)	17
<i>United States v. Gould</i> , 364 F.3d 578 (5th Cir. 2004)	16
<i>United States v. Howard</i> , 106 F.3d 70 (5th Cir. 1997)	6
<i>United States v. MacDonald</i> , 916 F.2d 766 (2d Cir. 1990)	6, 17
<i>United States v. Marshall</i> , 157 F.3d 477 (7th Cir. 1998)	6
<i>United States v. McGregor</i> , 31 F.3d 1067 (11th Cir. 1994).....	20
<i>United States v. Mowatt</i> , 513 F.3d 395 (4th Cir. 2008).....	13, 18, 19
<i>Vance v. North Carolina</i> , 432 F.2d 984 (4th Cir. 1970).....	6
<i>United States v. Rubin</i> , 474 F.2d 262 (3d Cir. 1973).....	6
<i>United States v. Scroger</i> , 98 F.3d 1256 (10th Cir. 1996).....	11
<i>United States v. Shye</i> , 492 F.2d 886 (6th Cir. 1974)	6
<i>United States v. Snipe</i> , 515 F.3d 947 (9th Cir. 2008).....	6
<i>United States v. Standridge</i> , 810 F.2d 1034 (11th Cir. 1987).....	6
<i>United States v. Timberlake</i> , 896 F.2d 592 (D.C. Cir. 1990)	14
<i>United States v. Turner</i> , 650 F.2d 526 (4th Cir. 1981).....	6

TABLE OF AUTHORITIES
(Continued)

STATE CASES

<i>Finn v. Commonwealth</i> , 2008-SC-749-DG.....	13
<i>Nethercutt v. Commonwealth</i> , 43 S.W.3d 330 (Ky. App. 1931)	13

STATUTES

Ky. Rev. Stat. 218A.1422(2).....	13
Ky. Rev. Stat. 218A.500(5).....	13

COUNTER STATEMENT OF THE CASE

The Commonwealth repeatedly misrepresents the factual record in order to create the erroneous impression that exigent circumstances justified the officers' warrantless entry into King's apartment. The Commonwealth claims that the police entered and searched King's home in pursuit of a cocaine dealer. Pet. at 2, 3. However, the lower courts specifically found that the officers did not know which apartment the cocaine dealer entered, and that the whereabouts of dealer played no role in their decision to enter King's apartment. Pet. App. at 3a, 5a, 6a, 8a, 36a. The Kentucky Supreme Court observed that the police "gave two reasons for the decision to enter [King's] apartment without a warrant: the fact that a crime was occurring based on the odor of marijuana, and the possible destruction of evidence based on the sound of movement inside the apartment." Pet. App. at 41a, 36a.

The Commonwealth also claims that the police announced themselves "three times." Pet. at 3. However, the record is devoid of any information about how many times the police knocked, or about how much time elapsed between when the officers announced their presence and when they entered the apartment.¹

¹ The Commonwealth distorts other facts, as well. In an attempt to create the appearance that the situation was urgent, the Commonwealth claims that the officers smelled *burning* marijuana. Pet. at 2. However, the trial court repeatedly found that the police smelled *burnt* marijuana, and the record is devoid of any evidence about the length of time that the odor of marijuana lingers in the air. Pet. App. at 3a, 4a, 6a, 8a. The Commonwealth claims that: "There were only two doors into which the felon could have fled." Pet. at 2. In actuality, four different apartments shared the breezeway in question, hence the repeated references to the *back* apartments. Pet. App. at 5a. The Commonwealth also erroneously suggests that King sold cocaine to the undercover officer. See e.g. Pet. at 31 ("Had the Respondent in this case made the sale in Virginia... Respondent, however, did not make the sale in Virginia. He made it in Kentucky...") The cocaine dealer and King are not the same person. Pet. App. at 6a. Lastly, the Commonwealth notes that the search occurred on October 15, 2005. Pet. at 2. The search actually occurred on October 13, 2005. Pet. App. at 1a, 2a, 34a.

The facts as found by the trial court, and reiterated by the Kentucky Supreme Court, are as follows. A drug dealer sold crack cocaine to an undercover police officer. Pet. App. at 2a, 35a. That undercover officer radioed to several stand-by officers that the cocaine dealer entered the back *right* apartment of an apartment complex. *Id.* The stand-by officers heard only a part of the radio broadcast. They did not hear (and did not independently know) which apartment the cocaine dealer entered. *Id.* As the stand-by officers proceeded down the breezeway of the apartment complex, they heard a door slam. *Id.* Their attention was then diverted by the odor of burnt marijuana, which they believed emanated from the back *left* apartment. *Id.* One of the stand-by officers knocked on the back left apartment door and identified himself as a police officer. *Id.* at 3a-4a, 36a. In response, the officers heard “people moving around” inside. *Id.* at 4a, 43a. The stand-by officers kicked in the door and searched the apartment. *Id.* at 4a, 36a. They found drugs, drug paraphernalia, and \$2,500.00 in cash. *Id.* at 4a-5a, 36a. Eventually, the officers realized their mistake, entered the back *right* apartment, and arrested the cocaine dealer. *Id.* at 6a, 36a. King lives in the back *left* apartment. *Id.* at 6a-7a, 37a.

REASONS FOR DENYING THE WRIT

- I. This Court should not disturb the lower court's factual finding that "the police were not in hot pursuit of a fleeing felon" in order to decide a question about the hot pursuit exception that has not divided the Courts of Appeal.

This case does not provide a vehicle for this Court to resolve the Commonwealth's hot pursuit question because, as the lower court found, the police did not enter King's apartment in pursuit of the cocaine dealer. Moreover, following this Court's instruction, every federal appellate court applies the same "totality of the circumstances" test to determine whether exigent circumstances exist. Whether the suspect is aware he is being pursued is only one factor that courts consider when determining whether the hot pursuit exception applies.

- A. Because the police were not in pursuit of a fleeing felon when they entered King's apartment, the hot pursuit question presented by the Commonwealth calls for an advisory opinion from this Court.

This is not a hot pursuit case. Because the police were not in hot pursuit of a fleeing suspect when they kicked in the door to King's apartment, the hot pursuit question presented by the Commonwealth – but not actually presented by the facts of this case – is purely academic. This Court should decline the Commonwealth's invitation to issue an advisory opinion. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-46 (1936) (refusing to render an advisory opinion.)

The Commonwealth's hot pursuit question presumes that the police were pursuing a fleeing felon when they entered King's apartment. They were not. The stand-by officers entered the breezeway in pursuit of the cocaine dealer, but their

attention was diverted once they detected the odor of burnt marijuana emanating from King's apartment. The Kentucky Supreme Court explained that two things motivated the officers' decision to kick in the door of King's apartment; the whereabouts of the cocaine dealer was not one of them:

As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Pet. App. at 36a.

The second sentence of the Kentucky Supreme Court's opinion begins: "We hold that the police were not in hot pursuit of a fleeing suspect...." Pet. App. at 34a. And, the court rejected the applicability of the hot pursuit exception in the section of its opinion titled: "The Police Were Not In Hot Pursuit of a Fleeing Suspect." Pet. App. at 40a.

The Kentucky Supreme Court reviewed the record and concluded that the trial court's findings of fact "were supported by substantial evidence, and are therefore conclusive." Pet. App. at 38a. This Court should defer to those findings. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue.")

- B. The Courts of Appeal apply the same “totality of the circumstances” test to determine whether exigent circumstances exist and the hot pursuit question applies.

The *amici* states urge this Court “to take this case to set forth a uniform national standard for analyzing exigent circumstances.” Am. Pet. at 2. This Court has already done that. In *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), this Court granted *certiorari* to resolve the “differences among state courts and the Courts of Appeals concerning the appropriate standard governing warrantless entry by law enforcement in an emergency situation.” *Id.* at 402. This Court instructed that police action is “reasonable” under the Fourth Amendment “regardless of the individual officer’s state of mind, as long as the circumstances, viewed objectively, justify the action.” *Id.* at 404 (internal citation omitted).

The Commonwealth urges this Court to grant *certiorari* and decide whether the hot pursuit exception applies “only if the government can prove that the suspect was aware that he was being pursued.” Pet. at 28. Again, this Court’s existing case law already answers that question. No single fact, *e.g.* the suspect’s awareness of his or her pursuit, controls the applicability of the hot pursuit exception; this Court has “consistently eschewed bright-line rules” in favor of a “totality of the circumstances test.” *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

In accordance with *Brigham City* and *Robinette*, all of the Courts of Appeal employ a “totality of the circumstances” test to determine whether exigent

circumstances, including the pursuit of a fleeing felon, justify a warrantless search.² A suspect's knowledge of his or her pursuit is just one factor that courts consider when determining whether the hot pursuit exception applies.

As recently as four years ago, this Court employed the "totality of the circumstances" to determine whether exigent circumstances authorized the *Brigham City* officers to conduct a warrantless search. *See Brigham City*, 547 U.S. at 406 ("We think the officers' entry here was plainly reasonable under the circumstances.") All of the Courts of Appeal utilize the "totality of the circumstances" test without difficulty or division, and that approach fully answers the Commonwealth's hot pursuit question. This Court should not disturb the lower court's factual finding that the police did not enter King's apartment in pursuit of a

² *See Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc) (articulating a non-exhaustive list of factors for a reviewing court to consider when determining whether exigent circumstances exist, recognizing "the numerous and varied street fact situations do not permit a comprehensive catalog" of when it is objectively reasonable to conclude that exigent circumstances were present); *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980) ("the *Dorman* approach has value," but "it is not to be used...as a pass or fail checklist for determining exigency."); *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (the test to determine whether exigent circumstances exist "is an objective one that turns on...the totality of the circumstances confronting law enforcement agents in the particular case."); *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (identifying a list of circumstances "which have seemed relevant to courts" when ascertaining whether exigent circumstances existed, again recognizing that "emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized."); *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970) (following *Dorman*); *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (following *Rubin*); *United States v. Howard*, 106 F.3d 70, 77 (5th Cir. 1997) ("We must look to the totality of the circumstances and for both direct and circumstantial evidence of exigency."); *United States v. Shye*, 492 F.2d 886, 891-92 (6th Cir. 1974) (following *Dorman*); *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998) ("Looking at the totality of the circumstances in this case...exigent circumstances existed."); *Creighton v. Anderson*, 922 F.2d 443, 447-48 (8th Cir. 1990) (following *Dorman*); *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008) ("Considering the totality of the circumstances, law enforcement must have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm."); *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998) (there "is no absolute test for determining whether exigent circumstances are present because such a determination ultimately depends on the unique facts of each controversy."); *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) (per curiam) (following *Dorman*).

fleeing felon in order to decide a well-worn issue that has not divided any of the Courts of Appeal.

- C. The fact that one state's intermediate appellate court has issued a single opinion in disagreement with the Kentucky Supreme Court, the Georgia Supreme Court, and the "totality of the circumstances" approach employed by all of the Courts of Appeal does not merit this Court's attention.

The Commonwealth's argument for why this Court should grant *certiorari* on the hot pursuit question is unconvincing. The Commonwealth does not identify a disagreement among the federal appellate courts because one does not exist. Instead, the Commonwealth identifies a single opinion from Virginia's intermediate appellate court and argues that it is an outlier.

The fact that one state's intermediate appellate court has, on one occasion, has "taken a completely different approach" than the Kentucky Supreme Court, the Georgia Supreme Court, and the "totality of the circumstances" approach employed by every federal appellate court does not merit this Court's attention. *See e.g. Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system...we must occasionally perform a pure error-correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land.") A single conflicting opinion from one state's intermediate appellate court hardly constitutes a "divergent application of the hot pursuit exception...across the many jurisdictions of the United States." Pet. at 31.

II. The Commonwealth's police-created exigency question calls for an advisory opinion from this Court.

King prevails regardless of which police-created exigency test this Court employs. What the police did (or did not do) before they entered King's apartment has no bearing on the outcome of this case. The Commonwealth's bold claim that it would have won had the case been litigated in the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits is mistaken. Pet. at 10. Because no exigency ever existed, the officers' warrantless entry into King's apartment was at all times unlawful.

Every police-created exigency case necessarily presents two questions: (1) did an exigent circumstance exist and, if so (2) did the police impermissibly "create" the exigent circumstance? To avoid issuing an advisory opinion, it is axiomatic that a court must answer the first question in the affirmative before proceeding to the second question. Plainly, the police cannot be said to have "created" an emergency if no emergency existed. In the instant case, the Commonwealth would lose in every federal appellate court on the first question.

No emergency existed here. The odor of burnt marijuana emanating from King's apartment plus the nondescript and unremarkable sound of "people moving around" inside does not support the factual inference that the occupants might destroy crime evidence. In fact, this Court has already held that the odor of burning drugs and the sound of "shuffling or noise" from within a private dwelling does not support the factual inference that the occupant(s) might destroy evidence. The

Commonwealth does not ask this Court to revisit that conclusion, and there is no need for this Court to do so.

In *Johnson v. United States*, 333 U.S. 10 (1948), the police received a tip that unknown persons were smoking opium in a hotel room, and they immediately smelled the “distinctive and unmistakable” odor of burning opium emanating from Room 1. The officers knocked on the door “and a voice inside asked who was there.” One of the officers identified himself as “Lieutenant Belland.” After “a slight delay” and some “shuffling or noise” in the room, the defendant opened the door and “acquiescently” admitted the officers. Belland told the defendant that he wanted to talk to her about the opium smell. She denied that there was such a smell, and Belland arrested her and searched the room. The defendant moved to suppress the “incriminating opium and smoking apparatus” discovered in the search. The District Court denied the motion and the Ninth Circuit affirmed. *Id.* at 12.

This Court reversed. This Court noted that the odor of burning opium might have supplied the probable cause necessary for the issuance of a search warrant. *Id.* at 13. But, this Court concluded that the officers’ unlawfully entered the apartment without a warrant. This Court explained:

No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a moveable vehicle. *No evidence or contraband was threatened with removal or destruction*, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

Id. at 15; emphasis added; *see also Taylor v. United States*, 286 U.S. 1, 6 (1932) (“Prohibition officers may rely on a distinctive odor [of whiskey] as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties...against unreasonable search.”)

Johnson remains good law, and its reasoning is sound. If the odor of burning – or in this case “burnt” – drugs were enough to supply both the probable cause *and* exigent circumstances necessary to effectuate a warrantless entry into a person’s home, then the Warrants Clause would be devoid of all meaning. Ex ante, the government could justify a warrantless search simply by presenting evidence that the officer in question was qualified to detect the odor of narcotics. Nothing more would be required. The potential for abuse and pretextual searches would be intolerably high.³

Moreover, the sound of “shuffling or noise” – or in this case, “people moving around” – in response to a knock on the door by the police does not supply any additional information about what a person may (or may not) be doing inside his home. Not surprisingly, this Court *presumes* that “movement” will follow an

³ At the suppression hearing in the instant case, the stand-by officer who knocked down the door to King’s apartment was asked about his hunch that the “people moving around” inside King’s apartment were destroying evidence. The officer was asked whether, upon entry, he found any evidence consistent with the destruction of evidence. The officer testified that he thought items on the coffee table in the middle of the room “looked like they had been recently moved” because “a baggie” was “in proximity” to a picture frame. In apparent recognition of the absurdity of his own testimony, the officer then “candidly admitted that there is no legal obligation for occupants of these apartments or any other residence or dwelling unit to open the door to a knock and demand from law enforcement officers” and he “candidly admitted that people move inside apartments without being involved in illegal criminal activity.” Pet. App. at 6a.

officer's knock at the door. *See e.g. Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (the knock-and-announce rule "assures the opportunity to collect oneself before opening the door"); *Richards v. Wisconsin*, 520 U.S. 385, 393 n. 5 (1997) ("[W]hen police enter a residence without announcing their presence, the residents are not given an opportunity to prepare themselves.... The brief interlude between announcement and entry...may be the opportunity that an individual has to pull on clothes or get out of bed.")

If this Court finds that exigent circumstances existed here, then any time the police have probable cause to believe that the occupants of a private dwelling are consuming drugs they may breach the threshold. Any person who answers (or attempts to answer) the door and assert his Fourth Amendment rights will have engaged in the exact behavior, *i.e.* "moving around," found to justify a warrantless entry. That hardly comports with this Court's admonishment that there is no *per se* exigency rule in drug cases.⁴ *See United States v. Karo*, 468 U.S. 705, 717 (1984) (people suspected of drug offenses are protected by the Warrants Clause to the same degree as people suspected of nondrug offenses).

⁴ There is a *per se* exigency rule in automobile cases. Motorists suspected of possessing narcotics are not entitled to the same degree of Fourth Amendment protection as the occupants of a home. *See Maryland v. Dyson*, 527 U.S. 465, 467 (1999) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits the police to search the vehicle without more.") Moreover, several courts have held that exigent circumstance arise when the police detect odors associated with the highly dangerous process of methamphetamine manufacturing. *See e.g. United States v. Clarke*, 564 F.3d 949, 959 (8th Cir. 2009); *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996). Unlike methamphetamine manufacturing, however, the consumption of marijuana within one's home does not present any immediate or inherent threat to public safety (as evinced by the fact that Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon, have all decriminalized the possession of a small quantity of marijuana.)

Moreover, this Court has unanimously rejected the notion that every drug investigation presents the potential risk that persons will destroy of evidence. In *Richards*, this Court was asked to adopt a blanket exception to the knock-and-announce requirement for drug investigations on the theory that such investigations frequently present a threat of violence or the potential destruction of evidence. *Richards*, 520 U.S. at 388. This Court noted that although “felony drug investigations may frequently involve both these circumstances,” creating exceptions “based on the ‘culture’ surrounding a general category of criminal behavior presents at least two serious concerns.” *Id.* at 392. The first concern is that such an exception “contains considerable overgeneralization.” *Id.* at 393. This Court recognized that “while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree.” *Id.* at 393. The second concern “with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others.” *Id.* at 393-94. This Court noted that armed “bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence...the Fourth Amendment’s reasonableness requirement would be meaningless.” *Id.* at 394.

Both those concerns are present in this case. This case involves the investigation of a misdemeanor drug offense, *i.e.* the one time possession of a so-called personal-use quantity of marijuana.⁵ The only evidence plausibly threatened with destruction was any paraphernalia associated with marijuana consumption and whatever might remain of an unused portion of that drug. As of this brief filing date, possession of drug paraphernalia and drug residue are also both considered misdemeanor offenses in Kentucky.⁶ Prior to their entry, the stand-by officers knew nothing about the occupant(s) of King's apartment, including whether they had a penchant for drug possession, drug trafficking, violence, weapons possession, the destruction of evidence, etc. If this Court were to permit a warrantless entry on the basis of exigent circumstances in King's case then, as *Richards* predicts, any limiting principle will be impossible to discern.

Not surprisingly, in light of *Johnson* and *Richards*, no Court of Appeals has held that the odor of burning marijuana coupled with the nondescript sound of "movement" inside a home constitutes exigent circumstances. *See United States v. Mowatt*, 513 F.3d 395, 397, 400-02 (4th Cir. 2008) (the odor of marijuana and "movement on the inside of the apartment confirming that somebody was walking

⁵ In Kentucky, the consumption of illegal substances is not a crime. *See Nethercutt v. Commonwealth*, 43 S.W.3d 330 (Ky. App. 1931) (A prohibition era case, in which the "Attorney General very frankly admits that liquor in one's stomach does not constitute possession within the meaning of the law"). Marijuana possession, however, is a Class A misdemeanor offense. *See Ky. Rev. Stat. 218A.1422(2)* (so stating).

⁶ In Kentucky, the possession of drug paraphernalia is a Class A misdemeanor for the first offense and a Class D felony for subsequent offenses. *See Ky. Rev. Stat. 218A.500(5)*. As of this brief filing date, the Kentucky Supreme Court is considering whether the possession of drug residue constitutes a crime at all. *See Finn v. Commonwealth*, 2008-SC-749-DG (submitted for consideration following oral argument on April 16, 2010).

around” did not evince exigent circumstances); *United States v. Collins*, 510 F.3d 697, 700-01 (7th Cir. 2007) (the suspicion of cocaine trafficking, a person in the house observing that “the police are at the door,” and “a sound of movement not further defined” does not support the inference that evidence “was being, or was about to be, destroyed.”); *United States v. Timberlake*, 896 F.2d 592, 597-98 (D.C. Cir. 1990) (the odor of PCP alone, without anything in the record to suggest “that the officers heard anything on the other side of the apartment door indicating that its occupants were destroying or about to destroy evidence,” does not give rise to an “exigent circumstance justifying the warrantless entry.”); *compare United States v. Carr*, 939 F.2d 1442, 1447-49 (10th Cir. 1991) (the strong odor of PCP emanating from a motel room, the fact that an occupant “slammed the door shut, locked it, and shouted to another individual inside the motel room that the police were inside,” followed by “commotion, shuffling and movement inside the motel room,” and the sound of a toilet flushing, constituted exigent circumstances). The Commonwealth’s assertion that it would have prevailed in most of the Courts of Appeals is wrong. Pet. at 10. The Commonwealth loses before any court reaches the created-exigency stage of the analysis.

The Commonwealth makes no attempt to distinguish *Johnson* or *Richards* or to argue that either case was wrongly decided. The Commonwealth simply ignores *Johnson* and *Richards* altogether. The Commonwealth has wisely chosen not to renew its former argument that the odor of marijuana emanating from an

apartment and the sound of “people moving around” inside support the factual inference that someone might destroy evidence.⁷

The Commonwealth would have this Court simply assume – as the Kentucky Supreme Court did – that exigent circumstances existed.⁸ This Court should reject that approach. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (the lower court’s “failure to assess whether exigent circumstances were present in this case violated *Payton v. New York*, 445 U.S. 573, 590 (1980).”) (full citation to *Payton* added).

In sum, in accordance with *Johnson* and *Richards*, exigent circumstances never existed, either before or after the police knocked on the door to King’s apartment and announced their presence. As this Court’s own case law already strongly suggests, the warrantless entry into King’s apartment was at all times unlawful. The Courts of Appeal are not “deeply divided” on the issue of whether the odor of burnt marijuana emanating from an apartment and the sound of “people moving around” inside constitutes exigent circumstances. No federal appellate court has held that they do. King prevails regardless of which police-created

⁷ To the extent that it makes an argument at all, the Commonwealth’s implicit contention that exigent circumstances existed is based entirely on its specious claim that in addition to the odor of burning marijuana and the sound of “people moving around,” the police also entered King’s apartment in pursuit of the cocaine dealer. Pet. at i, 2-3, 21. As discussed *supra*, that claim is factually inaccurate. The Kentucky Supreme Court found that only two facts motivated the stand-by officers’ decision to enter King’s apartment: “the fact that a crime was occurring based on the odor of marijuana, and the possible destruction of evidence based on the sound of movement inside the apartment.” Pet. App. at 41a.

⁸ The Kentucky Supreme Court cited to *Johnson*, acknowledged that “[o]dor alone is generally an insufficient basis for the warrantless search of a home based on imminent destruction of evidence,” and commented that “[t]here is certainly some question as to whether the sound of persons moving was sufficient to establish that evidence was being destroyed.” Pet. App. at 41a-43. However, the court then assumed *arguendo* that exigent circumstances existed in order to “proceed to the more important question of whether police created their own exigency.” *Id.* at 43a.

exigency test this Court articulates because the analysis need not (and should not) advance that far. The Commonwealth asks this Court to resolve a purely academic question, which is not presented here. To the extent that this Court is interested in addressing the question of police-created exigencies, it should wait for a different case to do so.

III. The Commonwealth exaggerates the division between the Courts of Appeal in order to create the false impression that the courts are “irreconcilably split.”

Only four Courts of Appeal – the Second, Third, Fifth, and Eighth Circuits – have expressly identified a test or methodology for evaluating whether the police have “created” or “manufactured” exigent circumstances. The remaining Courts of Appeal have yet to articulate or consistently apply a test in created-exigency cases.

The Fifth and Third Circuits employ the same test. That test “involves two levels of inquiry, first whether the officers deliberately created the exigent circumstances with bad faith intent to avoid the warrant requirement, and second, even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement.” *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004); *see also United States v. Coles*, 437 F.3d 361 (3d Cir. 2006) (analyzing, then adopting, the Fifth Circuit’s test for evaluating police-created exigency questions).

The Second Circuit employs a different test. The Second Circuit does not consider whether the officers acted in bad faith. Instead, as long as “law enforcement agents act in an entirely lawful manner, they do not impermissibly

create exigent circumstances.” *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990).

The Eighth Circuit inquires “into the appropriateness of investigative tactics as the principled way to evaluate whether the officers created the exigent situation” without regard to whether the police acted in bad faith (because “the danger to constitutional rights more often comes from ‘zealous officers’ rather than faithless ones.”) *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990); *see also United States v. Cisneros-Guiterrez*, 598 F.3d 997, 1005 (8th Cir. 2010) (“We must determine the reasonableness and propriety of the investigative tactics that generated the exigency.”) The court pays particular attention to whether the police “foreseeably increase the likelihood of the destruction of evidence.” *Cisneros-Guiterrez*, 598 F.3d at 1006.

King agrees with the Commonwealth’s characterization of the tests adopted by the Second, Third, Fifth, and Eighth Circuits. But, none of the other Courts of Appeals have articulated a “test” or methodology for evaluating created-exigency cases, which they have applied uniformly or consistently to multiple cases.

According to the Commonwealth, the First and Seventh Circuits consider whether the police have “unreasonably or purposefully delayed in obtaining a warrant.” Pet. at 11. But, this “test” pertains to whether exigent circumstances exist, not whether the police have impermissibly “created” them. This Court has instructed that if the police have the opportunity to obtain a warrant, then no true exigency exists. *See Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (because, *inter*

alia, “there is no suggestion that a search warrant could not easily and conveniently have been obtained,” no exigent circumstances existed.)

The Commonwealth also contends that the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits consider “whether there has been an unreasonable or purposeful delay in obtaining a warrant. These circuits, however, will not find that police have impermissibly created the resulting exigent circumstances without a finding of ‘deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement.’” Pet. at 13 (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002)). However, the Commonwealth misreads *Ewolski*. In that case, the Sixth Circuit cited one of its own cases and a single case from the Ninth Circuit, and observed, generally and in *dictum*, that “the created exigency cases have typically required some showing of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement.” *Id.* at 504. Such an observation hardly constitutes the articulation of a test. With regard to the other courts, the Commonwealth simply pulls an isolated sentence from one opinion in each circuit and erroneously claims that it represents that court’s “test.”

The Commonwealth likewise misreads the Fourth Circuit’s case law. The Commonwealth claims that the Fourth Circuit considers whether “the exigent results of the police officers’ actions were reasonably foreseeable.” Pet. at 16. In support, it cites to *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008). But, in that case, the court held that the odor of marijuana emanating from an apartment and “movement on the inside of the apartment confirming that somebody was

walking around” did not constitute exigent circumstances. *Id.* at 400-01 (“To have authority to make a warrantless search, the officers needed exigent circumstances, and *Johnson* tells us they were not present in this case.”) *Mowatt* is not a created-exigency case.

At any rate, even assuming for the sake of argument every federal appellate court has articulated the created-exigency test identified by the Commonwealth, any differences between the tests do not merit this Court’s attention. Because the ultimate touchstone of the Fourth Amendment is “reasonableness” – itself a fact-intensive, somewhat amorphous concept – each of the created-exigency tests is likewise fact-dependent and flexible. The various tests either state the obvious or rely on a “reasonableness” standard or both. All of the tests are breathtakingly broad and tautological in nature. Again, the tests are:

- Regardless of whether the police acted in bad faith, the police impermissibly create exigent circumstances when their actions were “sufficiently unreasonable or improper.” (Third and Fifth Circuits).
- The police do not impermissibly create exigent circumstances when they “act in an entirely lawful manner.” (Second Circuit).
- The “principled way to evaluate whether the officers created the exigent situation” is to inquire “into the appropriateness of investigative tactics.” (Eighth Circuit).
- The police impermissibly create exigency circumstances whey they “unreasonably or purposefully delay obtaining a warrant.” (First and Seventh Circuits).
- The police impermissibly create exigent circumstances when they “unreasonably or purposefully delay in obtaining a warrant” and when they intentionally evade the warrant requirement. (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits).

- The police impermissibly create exigent circumstances when “the exigent results of the police officers’ actions were reasonably foreseeable.” (Fourth Circuit).

Who could plausibly disagree with any of those statements? More to the point, what exactly is the difference between inquiring whether the police acted in a “sufficiently unreasonable” manner (Third and Fifth Circuits), or in an “entirely lawful manner” (Second Circuit), or in an “appropriate” manner (Eighth Circuit), or “unreasonably” (First, Sixth, Seventh, Ninth, Tenth, Eleventh, D.C. Circuits), or whether the results of their actions were “reasonably” foreseeable (Fourth Circuit)? Neither the *amici* states nor the Commonwealth provides an answer.

The Commonwealth complains that there is an “irreconcilable split” among the Courts of Appeal, but it is difficult to discern any true difference between the applications or outcomes of *any* of the tests ascribed to the courts by the Commonwealth. For example, it is difficult to conceive of how the outcome of a case would depend on whether it was litigated in the First and Seventh Circuits as opposed to the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits. According to the Commonwealth, the First and Seventh Circuits consider whether the police have “unreasonably” delayed in obtaining a warrant, whereas the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits consider whether the police have “unreasonably” delayed in obtaining a warrant *and* whether the police have attempted “to evade the warrant requirement.” By definition, “evasion” of the warrant requirement is “unreasonable.” One would expect the same result to follow in all of those courts. *Cf. United States v. McGregor*, 31 F.3d 1067, 1070 n. 2 (11th Cir. 1994) (doubting

that the outcome of a created-exigency case would be different in the Eighth and Eleventh Circuits).

The Commonwealth boldly claims that “[d]epending on which circuit or state this case was litigated in, different results would be reached.” Pet. at 20. Remarkably, however, both the Commonwealth and the *amici* states fail to cite to any cases where different circuits have reached disparate conclusions when presented with similar fact patterns.

The Commonwealth asks this Court to articulate a bright-line rule for determining whether, and when, the exigent circumstances exception to the warrant requirement applies when police “create” the exigency. Pet. at 9. All of the federal appellate courts follow this Court’s instruction and use “reasonableness,” broadly defined, as the touchstone for evaluating created-exigency cases. They are not in need of further guidance from this Court.

In sum, this is not a created-exigency case. The odor of marijuana emanating from an apartment, coupled with the sound of “people moving around” inside does not support the factual inference that evidence might be destroyed. Because exigent circumstances never existed, the officers’ warrantless entry into King’s apartment was, at all times, unlawful. The Commonwealth’s created-exigency question impermissibly calls for an advisory opinion from this Court. This case is not the proper vehicle for deciding created-exigency questions.

CONCLUSION

For the reasons discussed herein, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jamesa J. Drake', with a stylized flourish at the end.

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